Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

No. 02-1364

In the

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE -PICASO,INC., LAWRENCE PICASO, INC. d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents-Employers submit that the following questions more accurately reflect the fundamental legal question presented below.

1. Where a jury finds that an employee has been wrongfully discharged, is it an abuse of discretion by the Trial Court to limit the damages to the wages and benefits for the unexpired term on his employment contract?

The Appellate Division properly answered this question in the negative and held the damages were properly reduced.

2. Where an employee of a real estate management company is employed pursuant to a written employment agreement for an initial three-year term was it an abuse of discretion for the Trial Court to reduce a jury verdict from an award of 4½ years of salary to the 13 months left on the initial term where the employee has (a) forged the names of building owners on official New York City forms in violation of various company policies, New York State statutes and New York City ordinances, (b) defamed and disparaged the employer to its clients, to wit, owners of buildings it manages; (c) violated the office policies of the employer by failing to call in when taking sick days, (d) violated the minimum standards of performance set by the employer and Appellant's own expert witness regarding visitation and care of the buildings in his care, (e) been non-responsive, rude and obnoxious to tenants and building owners, (e) failed to honor the work hours of the employer; (f) utilized his

position at the employer management company to deliberately grant benefits to his mother, a partner on certain properties, to the detriment of his mother's other partners and particularly prejudicial to the interest of one partner who was particularly despised by his mother, and (f) had refused to modify his behavior after repeated notices and warnings?

The Appellate Division answered this question in the negative and held that the reduction was proper.

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Respondents Lawrence-Properties, Inc., Lawrence-Picaso, Inc., d/b/a Lawrence Properties and Lawrence Properties [hereinafter "Respondents-Employers"] request that this Court deny the Petition for Certiorari filed by Mark Weiner [hereinafter "Petitioner-Employee"], seeking review of the decision of the Supreme Court of the State of New York, Appellate Division, First Department entered in this case on September 17, 2002.

COUNTER-STATEMENT OF THE CASE

In a jury trial held in December, 2000, the testimony of the Petitioner-Employee himself showed that, in his capacity of property manager, he had, *inter alia*, forged the signatures of building owners on documents which were required to be filed with the City of New York, he had disparaged the Respondents-Employers during his employment to its own clients, and he had failed to visit buildings under his care-even to the minimal standard testified to by his own expert.

On December 21, 2000, after a jury trial, Petitioner-Employee obtained a verdict against Respondents-Employers in the amount of $205,000.00. This represented salary not only for the unexpired term of the Petitioner-Employee's employment agreement (13 months), but for an extra three and a half years past the end of the employment agreement (for a total award of 4½ years of salary and benefits). Respondents-Employers made a post-trial motion to reduce the jury verdict, which was granted by the Trial Court on February 5, 2002. The Trial Court ordered a reduction in the amount of damages and awarded judgment to the Petitioner-Employee in the reduced amount of $34,266.67. This sum represented the amount of salary

due Petitioner-Employee for the remainder of the initial term of his employment contract. On or about February 5, 2002, Petitioner-Employee filed a Notice of Appeal with the Appellate Division,[1] First Department [hereinafter "Appellate Division"]. On March 18, 2002 Respondents-Employers were served with a Note of Issue.

Petitioner-Employee had sued for wrongful termination of an employment agreement under which he had been hired by Respondents-Employers as a property manager. Respondents-Employers contended that the termination was warranted based upon, *inter alia*, the Petitioner-Employee's egregiously poor performance of his duties while an employee, which included, *by his own admission*, his forgery of the signatures of building owners on official government documents, his disparagement of Respondents-Employers to their clients, his failure to follow company policy with respect to visiting his buildings and calling in sick, and his constant rudeness to tenants and building owners.

Contrary to the Petitioner-Employee's misrepresentation of the facts asserted in his Petition, the record below clearly demonstrates that Petitioner-Employee admitted that he forged the signatures of building owners on Multiple Dwelling Registration forms which are required to be filed with the City of New York. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14]. In fact, it is indisputable that Petitioner-Employee willfully forged the names of the owners of the buildings. He did not

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1. The Appellate Division of the Supreme Court of the State of New York is the intermediate court of appellate review in the State of New York. The New York Court of Appeals is New York State's highest court.

testify that he negligently placed the signatures on the documents. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14]. He did not testify that he had forged the names as an office prank and that the forms had accidentally been filed. He did not allege that he signed the owners' names under the erroneous impression that he had been given a power of attorney. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA 30, lines 4 to 14].

Rather, Petitioner-Employee *admitted* that he knew that he was not the owner of the buildings, he did not think he had authority to sign the owners' signature, he willfully put his pen to the paper on the line of an official government form and willfully signed the name of another person. [RA-164, line 23 to RA-165, line 6]. Further, Petitioner-Employee's argument that the building owners were unavailable to sign was belied by the fact that Petitioner-Employee had a month to get the forms properly signed, they were available, and that one signatory (the representative of a building owner) sat at a desk just a few feet away from Petitioner-Employee's desk. [RA-28, lines 22 to RA-29, lines 10, RA-29, lines 13-24 to RA-30, lines 4-14, RA-79, lines 6-13.] Petitioner-Employee's admitted forgery is demonstrative of his malfeasance and wrongful misconduct and fully supports the Trial Court's finding that the employment agreement would not have been renewed.

Petitioner-Employee further claims that Respondents-Employers never gave him written notice of his substandard performance. However, even if true (which it is not), that was not an issue presented during the appeal and as such, this issue is not before this Court. Nevertheless, the trial was replete with exhibits documenting Petitioner-Employee's substandard performance, and notice to him thereof, including

memos to the file, letters to the Petitioner-Employer and to his attorney during his employment and complaints from tenants about his performance. [RA-772, RA-773, RA-783, RA-784, RA-785, RA-787, RA-795, RA-797, RA-799, RA-804.]

Additionally, Petitioner-Employee admitted that he failed to visit his buildings with sufficient frequency to satisfy even the *de minimis* standards of his own expert, much less those of the Respondents-Employers.[2] Petitioner-Employee's spurious excuse that his superiors never told him how often he was supposed to visit his properties and make building visits was belied by the testimony of all concerned, including his own testimony and that of his own expert. It was generally agreed that one of the biggest responsibilities of a property manager is to visit properties in his care. Petitioner-Employee's family business is the ownership of properties in Manhattan, and he was hired based upon his self-professed years of experience in the field of real estate management. Finally, and most importantly, the Petitioner-Employee's own expert admitted that a property manager was obligated to visit his properties at least once a month and more for larger buildings, a standard which Petitioner-Employee admitted he never came close to achieving. [A-239, lines 7-8.] Rather, Petitioner-Employee admitted that he only visited the apartment buildings under his care "when he felt it was necessary." [RA-175, lines 17-18.] When asked if he was supposed to report to a building a certain number of times, Petitioner-Employee replied "No." [RA-176, lines 23-25.] Respondents-Employers'

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2. Respondent-Employers' standards were set higher than those of other real estate management companies, which is why it was awarded the 2000 New York Association of Residential Managers Management Company of the Year Award. [RA-312, lines 21-25.]

witnesses testified that property managers were supposed to visit their buildings once or twice a week. [RA-313, lines 10-11]; [RA-522, line 6].

This conduct obviously constituted another one of the many "non-performance" portions of the "willful non-performance" ground for terminating Petitioner-Employee under his Employment Agreement. In fact, to show the "willful" portion of the non-performance, Respondents-Employers' witnesses testified that Petitioner-Employee had received numerous warnings about his failure to visit his buildings. [RA-736, line 22 to RA-737, line 18]; [RA-316, lines 8-14]; [RA-646, line 16, to RA-647, line 4]; [RA-309, lines 4-11]. In one 12 month period, Petitioner-Employee's own records showed that he visited his five buildings only 21 times, whereas a once-a-month standard would have required 60 visits! [See, Trial Exhibit PP, RA- 805-816.] Over the entire 22 months of his employment, Petitioner-Employee never met the minimum once a month threshold of building visits established by his own expert (i.e. 22 months x 5 buildings = 110 visits).

There was also substantial evidence presented to the Trial Court with regard to the Petitioner-Employee's disparagement of the Respondents-Employers to its own clients. In fact, the Petitioner-Employee testified with regard to the disparagement of Respondents-Employers upon questioning in the Trial Court. [RA-108, line 17 to RA-109, line 9]. Furthermore, there was evidence presented that the Petitioner-Employee was not compelled to disparage the Respondents-Employers, rather, he eagerly volunteered to do so. [RA-111, lines 5 to 16]. Witnesses confirmed that Petitioner-Employee made disparaging comments about the Respondents-Employers. [RA-34, lines 20-24, RA-538, lines 2-13]. This evidence supported the Trial Court's post-trial

finding that there was no evidence to establish that Petitioner-Employee's employment agreement would have been renewed. It was on this record (which included numerous other instances of Petitioner-Employee's egregiously insubordinate and inadequate performance of his job duties), plus the well-settled law in New York that damages for wrongful termination are strictly limited to the unexpired term of the employment agreement, that caused the Trial Court to reduce the jury's award to the salary only for the 13 month balance of the initial term of the employment agreement.

On June 7, 2002, Petitioner-Employee's appeal from the Trial Court's reduction of the damage award was heard before the Appellate Division. By decision dated June 27, 2002, the Appellate Division affirmed the Trial Court's ruling [hereinafter "Appellate Court Decision"]. Thereafter, Petitioner-Employee moved before the Appellate Division for leave to appeal to the Court of Appeals. On September 17, 2002, the Appellate Division denied said motion. Petitioner-Employee next sought leave of the Court of Appeals to appeal. On December 17, 2002, the Court of Appeals denied Petitioner-Employee's motion for leave to appeal.

In stating his questions presented for review before this Court, Petitioner-Employee has impermissibly side-stepped the issues which formed the basis for the Trial Court's reduction of the jury's damage award, of the Appellate Division's affirmance and of the Court of Appeals' refusal to disturb the holdings below. Rather, Petitioner-Employee erroneously contends, now for the first time, that the Appellate Division's affirmance vitiated Petitioner-Employee's constitutional right to a jury trial, violated Petitioner Employee's due process rights, and, violated Petitioner-Employee's right to equal protection of the law.

In light of (a) the Petitioner-Employee's failure to raise certain issues in earlier appeals, (b) the well-settled constitutionality of a trial court's right to reduce an excessive award of damages, and (c) the substantial facts which support the Respondents-Employers' termination of Petitioner-Employee, this Court should deny this application. Every court (the Trial Court, the Appellate Division, and both the Appellate Division and the Court of Appeals in denying leave to appeal to the Court of Appeals) has come to the conclusion that a reduction of the damages was appropriate based upon the facts presented. As a result of Petitioner-Employee's mischaracterization of the issues presented, Respondents-Employers are constrained to clarify the issues decided by the Appellate Division and affirmed by the Court of Appeals.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER-EMPLOYEE FAILED TO RAISE CLAIMS IN THE APPELLATE DIVISION

Petitioner-Employee's Petition for a Writ of Certiorari must be denied because he failed to raise claims in his appeal that he raises herein. In *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992), the Court stated that "[T]he failure to raise a claim on direct appeal is itself a default of normal appellate procedure, which results in a procedural default." *United States ex re. Regina v. LaVallee*, 504 F.2d 580 (2d Cir. 1974), *cert. denied*, 420 U.S. 947 (1975). In *Norwood v. Attorney General of the State of New York*, 1986 WL 1449 (S.D.N.Y. 1986), the Court ruled that issues not raised in petitioner's application for leave to appeal to the Court of Appeals may not be considered by the instant Court.

Moreover, this Court stated the following in *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992):

> As a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.'

Escondido, 503 U.S, at 535, 112 S.Ct. at 1533.

Petitioner-Employee incorrectly states that the first opportunity he had to assert his constitutional claims regarding due process, equal protection, and the Seventh Amendment were in his motion to the Appellate Division for reargument and for leave to appeal to the Court of Appeals. This is absolutely untrue; Petitioner-Employee could have – and should have – raised these arguments in opposition to Respondents-Employers' motion to reduce the damage award before the Trial Court and raised them again in his appeal to the Appellate Division; he did not do so. Even in his first post-appeal motion to the Appellate Division, although Petitioner-Employee only touched upon the alleged violation of his due process rights and Seventh Amendment rights, he completely failed to address his equal protection claim. Hence, the Petitioner-Employee's failure to raise this claim in the Appellate Division or before the Trial Court mandates denial of Petitioner-Employee's instant petition.

II. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITIONER

The issue presented for review was whether the Trial Court abused its discretion in limiting the damages

on the Petitioner-Employee's remaining breach of contract claim to the wages and benefits for the unexpired term on Petitioner-Employee's employment contract, to wit, thirteen months. The Appellate Division found that this was not an abuse of discretion given that the trial was

> replete with testimony demonstrating that plaintiff's actions, while in the defendant's employ, including failing to visit the buildings which he managed and forging the signatures of property owners on New York City Multiple Dwelling Registration Forms, constituted willful non performance and malfeasance, and as such, justified non-renewal of the employment agreement.
>
> The trial court's finding was warranted as a matter of law since there was 'no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury'. (see, *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493, 499)

[App. A, at 2a-3a][3]. The trial record presented to the Trial Court and the Appellate Division provided ample evidence of instances of willful misconduct, to wit, the Petitioner-Employee's forgery of the signatures of building owners on official documents, his blatant disparagement of Respondents-Employers to their clients, his failure to follow company policy with respect to visiting his buildings and with respect to calling in sick, his inattentiveness and rudeness to both tenants

[3] Citations in the form "App.__" are to the Appendix to Petitioner-Employee's petition.

and building owners, his violation of the minimum standards of performance set by the Respondents-Employers and Petitioner-Employee's own expert witness regarding visitation and care of the buildings in his care, his misuse of his position at the Respondents-Employers' management company to deliberately grant benefits to his mother, a partner on certain properties, to the detriment of his mother's other partners and his refusal to modify his behavior after repeated notices and warnings.

In affirming the Trial Court's decision, the Appellate Division merely agreed that, on the basis of the evidence presented at trial, there was no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury. By denying leave to appeal, the Court of Appeals affirmed this decision. Respondents recognize that the Court is not bound by the decisions below. However, the unanimity of the appellate judges strongly suggests the correctness of their holdings.

III. THE DECISION BELOW WAS CORRECT AND THE PETITIONER-EMPLOYEE'S RIGHT TO DUE PROCESS, RIGHT TO EQUAL PROTECTION OF THE LAW, AND SEVENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE APPELLATE DIVISION

As is shown below, the Petitioner-Employee's claims that the Appellate Division violated his constitutional rights to due process, equal protection of the laws, and the Seventh Amendment are completely without merit. The Petition's blunderbuss approach to the assertion of meritless constitutional objections

should not invoke this Court's intervention. Consequently, there is no basis for review here.

A. The Petitioner-Employee's Seventh Amendment Right to a Jury Trial Has Not Been Violated

The Petitioner-Employee has not been denied his Seventh Amendment Right to a jury trial. In the instant case, the Trial Court merely reduced the jury award of damages and the Appellate Division affirmed the Trial Court's decision to reduce the jury award. The Seventh Amendment provides:

> 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'
>
> [N]o fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

Petitioner-Employee was afforded his right of trial by a jury. Nonetheless, the remedies of *additur* and *remittitur*, which provide for modification of a jury award, are well-settled principles of Anglo-Saxon law and are unquestionably constitutional. In fact, a court's inherent right to issue a judgment *non obstante verdicto* predates both the United States and New York State Constitutions. In *Dimick v. Schiedt*, 55 S.Ct. 296, 293 U.S. 474, 79 L.Ed. 603 (1935), this Court held that in accordance with the established principles of common

law, a court has the inherent power to reduce a jury award of damages. Specifically, this Court stated in *Dimick v. Schiedt*, the following:

> It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk v. United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, 93 A.L.R. 1136. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations (8th Ed.) 124.

Dimick, 55 S.Ct. at 301, 293 U.S. at 487.

As such, the Trial Court's reduction of the jury award was constitutional. In fact, the post-trial motion for judgment notwithstanding the verdict is codified in NYCPLR 4401 and 4404(a). Both of these sections are substantively identical and differ only to the extent that the latter is made following the verdict and the former

prior to the factfinder's rendering of its verdict. NYCPLR 4404(a) states as follows:

> After a trial of a cause of action or issue triable of right by a jury upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . . .

In considering the merits of a party's Motion for Judgment Notwithstanding the Verdict, the factfinder's conclusions regarding the evidence are not germane; rather, the court in *Cohen v. Hallmark Cards, Inc.* 45 N.Y.2d 493, 328 N.E.2d 1145, 410 N.Y.S.2d 282 (1978) stated that, in order to support a conclusion to set aside a jury's verdict, the following threshold requirements must first be met:

> It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict.

45 N.Y.2d at 499.

Also, as discussed in more detail below, although phrased as a direction to New York's intermediate appellate courts, NYCPLR 5501(c)'s standard that states that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation, as construed by New York's courts, instructs state trial judges as well. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 425, 116 S.Ct. 2211, 2218, 135 L.Ed.2d 659 (1996). NYCPLR 5501(c) provides:

> The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Another case, wherein this Court addressed the rules of remittitur and additur is *Fox v. City University of New York*, 1999 WL 33875 (S.D.N.Y. 1999). In *Fox*, the Court stated as follows:

> . . . federal courts may not make orders of additur. That has been clear at least since 1935, when the Supreme Court held in

> *Dimick v. Schiedt*, 293 U.S. 474 (1935), that a federal court's order of additur would violate the Seventh Amendment. Plaintiff at bar suggests that *Gasperini* changes that holding, but Justice Ginsburg's opinion shows that is not so. The opinion enumerates exercises of a trial judge's discretionary authority that are not inhibited by the re- examination clause of the Seventh Amendment, stating in that regard: The Seventh Amendment, "which governs proceedings in federal court, but not in state court," *Gasperini*, 116 S.Ct. at 2222 (footnote omitted), provides that "no fact tried by a jury, shall be otherwise re- examined in any Court of the United States, than according to the rules of the common law." **This discretion includes overturning verdicts for excessiveness** and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur). See *Dimick v. Schiedt*, 293 U.S. 474, 486-487, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935) (recognizing that remittitur withstands Seventh Amendment attack, but rejecting additur as unconstitutional).
> (emphasis added). 116 S.Ct. at 2222.

Fox, at 1999 WL 33875 (emphasis supplied).

In consonance with the foregoing, the Trial Court properly reduced the jury award of damages. Petitioner-Employee has incorrectly stated that his constitutional right to jury trial was violated when the Trial Court reduced the jury award of damages, which the

Petitioner-Employee blatantly mischaracterizes as a modification of the issue of liability. [Petition, at p.13.] The Trial Court confirmed that the evidence adduced on Petitioner-Employee's own direct case, proved that he committed "willful non-performance" and/or "malfeasance" as a matter of law and that, their evident sympathy for Petitioner-Employee aside, there was no valid line of reasoning or permissible inference which could possibly lead rational persons to the conclusion reached by the jury. Contrary to Petitioner-Employee's contentions, the trial court found, after conducting the trial and after careful post-trial review of the evidence that the jury verdict was against the weight of evidence presented. Thus, the foregoing NYCPLR provisions, allowing a court to set aside a jury verdict, are not inherently unconstitutional. Based on the foregoing, the Petitioner-Employee was not denied his Seventh Amendment Right to a jury trial.

Additionally, the Appellate Division's Decision to unanimously affirm the Trial Court's damage reduction was well within its discretion and constitutional in all respects. This Court has stated in *Thompson v. Utah*, 170 U.S. 343, 350, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) and *Patton v. United States*, 281 U.S. 276, 288, 50 S.Ct. 253, 74 L.Ed. 854, (1930) that, to understand the scope and meaning of the Seventh Amendment, one must apply the appropriate common law rule established at the time of the adoption of that constitutional provision in 1791.

In *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), this Court held that under New York law, appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." This Court also stated as follows:

> In both state and federal courts, trial judges made the excessiveness assessment in the first instance, and appellate judges ordinarily deferred to the trial court's judgment. See, e.g., *McAllister v. Adam Packing Corp.*, 66 App.Div.2d 975, 976, 412 N.Y.S.2d 50, 52 (3d Dept.1978) ('The trial court's determination as to the adequacy of the jury verdict will only be disturbed by an appellate court where it can be said that the trial court's exercise of discretion was not reasonably grounded.'); *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (C.A.2 1984) ('The trial court's refusal to set aside or reduce a jury award will be overturned only for abuse of discretion.').

Gasperini, 518 U.S. at 422, 116 S.Ct. 2217.

Additionally, the court in *Fox v. City University of New York*, 1999 WL 33875 (S.D.N.Y. 1999), further stated:

> If the court makes an order of remittitur (for a lower amount) or additur (for a higher amount), the parties may stipulate to accept that amount, or undergo a new trial on damages. That both remittitur and additur are contemplated by § 5501 is made plain by its language; the statute applies to a litigant's contention 'that the award is excessive or inadequate,' and instructs the appellate division 'that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation' (emphasis added).

Fox, at 1999 WL 33875.

Based on the well-settled law, the Appellate Division's affirmance of the Trial Court's damage reduction was well within its discretion and was constitutional. The Trial Court found that the jury award of damages was against the weight of evidence presented and the Appellate Division affirmed that finding. Contrary to the Petitioner-Employee's position, the Appellate Division never directed a verdict that the Petitioner-Employee had committed forgery, had failed to visit the buildings he was managing, or that he had received written notice from Respondents-Employers of his malfeasance. The jury had already determined these issues in the Trial Court, as more thoroughly detailed in the counter-statement of facts, and awarded damages to the Petitioner-Employee. The Trial Court did not nullify the jury's verdict of liability, it merely reduced the damage award. Similarly, the Appellate Division respected the jury's finding of liability and merely affirmed the Trial Court's reduction of the jury's award of damages to the unexpired term of the employment agreement.

In an action in New York for wrongful discharge,

> [i]t is well settled that the optimum measure of damages for wrongful discharge under a contract of employment is the salary fixed by the contract for the unexpired period of employment . . . .

Amaducci v. Metropolitan Opera Association, 33 A.D.2d 542, 543, 304 N.Y.S.2d 322, 323 (1st Dept. 1969). See, *Howard v. Daly*, 61 N.Y. 362, 371-4 (1875); *Milage v. Woodward*, 186 N.Y. 252, 257, 78 N.E. 873 (1906); *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 192

N.Y. 439, 442, 85 N.E. 666 (1908); *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 354, 358, 169 N.E. 605 (1930). Hence, the reduction of the damage award to the balance of the initial term of the employment contract is completely in keeping with New York law.

Hence, Petitioner-Employee cannot assert that he has been denied his Seventh Amendment Right to Jury Trial on the aforementioned issues. Accordingly, Petitioner-Employee has not sustained its burden of proof and, its Petition for Writ of Certiorari must be denied.

B. The Petitioner–Employee's Due Process Rights Were Not Violated

The Petitioner-Employee has failed to allege that his due process rights were violated in that he has failed to allege that he has been deprived of any property without due process of law and that he has been deprived of any notice or an opportunity to be heard. While it is understood that a cause of action is a "species of property protected by the 14th Amendment," *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982), a jury verdict in and of itself is not a species of property. Governmental action that is alleged to have violated the Due Process Clause may only be successfully challenged when it can be shown that it deprives a litigant of a property or liberty interest. *General Elec. v. New York Department of Labor*, 936 F.2d 1448, 1453 (2d Cir. 1991). Furthermore, to claim a property interest in a benefit, a plaintiff must show more than an abstract need or desire for it or a unilateral expectation of it. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Story v. Green*, 978 F.2d 60, 62 (2d Cir. 1992).

Moreover, the existence of such property interests depends on "state law-rules or understandings that secure certain benefits and support claims of entitlement, *Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, such as a state contract or statute. *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 965 (2d Cir. 1988). Lastly, in addition to a cognizable property right, the plaintiff must allege that governmental action with respect to that property right amounts to a "deprivation" and that the deprivation occurred without due process. *Greene v. Town of Blooming Grove*, 935 F.2d 507, 510 (2d Cir. 1991); *Fusco v. Connecticut*, 815 F.2d 201, 205 (2d Cir. 1987).

Applying the aforementioned legal standard, Petitioner-Employee's assertions of deprivation are entirely illusory, since Petitioner-Employee's application fails to allege facts showing that state action deprived him of a protected property interest. *Story v. Green*, 978 F.2d 60, 62 (2d Cir. 1992) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576- 79, 92 S.Ct. 2701, 2708-10 (1972)).

In fact, this Court should note that Petitioner-Employee received more than ample due process. Petitioner-Employee was not only afforded due process by the Trial Court in its consideration of the post-trial motion to reduce the verdict of damages, but also by the Trial Court when it heard reargument of that post-trial motion, and then by the Appellate Division when it reviewed the Trial Court's reduction of damages, and then by the Appellate Division again when it denied the Petitioner-Employee's motion for leave to appeal to the Court of Appeals, and finally by the Court of Appeals when it too denied leave to appeal. It is hard to imagine what greater process of law could have been afforded to Petitioner-Employee. At every leg of this legal journey,

the Petitioner-Employee was on notice that the court was being asked to either reduce the jury's award of damages or affirm such reduction.

Petitioner-Employee further claims that he did not have an opportunity to be heard before the Appellate Division on the feigned issue of liability with regard to the forgeries, building visits, and written notice of his malfeasance. This is simply untrue. The purported issue of liability was never raised before the Appellate Division, thus, Petitioner-Employee's right to adjudicatory procedure was protected. Specifically, Petitioner-Employee presented his claim to a jury. The jury made its decision with regard to the liability issues. The jury rendered its verdict and the Respondents-Employers made a post-trial motion to reduce said jury verdict, which was appropriately granted by the Trial Court. Petitioner-Employee then filed a Notice of Appeal with the Appellate Division seeking a reversal only on the issue of damages. [A-3 and Respondents-Employers' Appendix A.]

Petitioner-Employee had an opportunity to be heard before the Appellate Division in briefs and in oral argument. The Appellate Division affirmed the Trial Court's decision to reduce the jury verdict. Petitioner-Employee then moved before the Appellate Division for leave to appeal to the Court of Appeals. Thus, Petitioner Employee had been given yet another opportunity to be heard and present his case. Thereafter, Petitioner-Employee moved before the Court of Appeals for leave to appeal. The Court of Appeals denied the Petitioner-Employee's motion for leave to appeal. Altogether, Petitioner-Employee has had numerous opportunities to be heard and therefore has not been deprived of any rights. By denying leave to appeal, the Appellate Division and the Court of Appeals

both recognized that Petitioner-Employee failed to present any constitutional questions regarding entitlement.

C. The Appellate Division Limited Its Decision To The Issue Presented in The Notice of Appeal

The Petitioner-Employee's own Notice of Appeal to the Appellate Division states that the Appellant appeals "to the extent that such Order and Judgment (i) reduced the jury's verdict in favor of plaintiff and against defendants from $205,000.00 to $34,266.67." [A-3 and Respondents-Employers' Appendix A.] Thus, the Petitioner-Employee appealed from that part of the Order and Judgment only to the extent that it focused on damages. The Trial Court expressly acknowledged that the issue before it was one of damages. Specifically, the Trial Court stated, "Accordingly, the only issue before this Court is the amount of damages." [Appendix E, at p. 18a].

Petitioner-Employee's reliance on *Vias v. Rohan*, 119 A.D.2d 672, 501 N.Y.S.2d 109 (2nd Dept 1986) is entirely misplaced. In *Vias*, plaintiff commenced an action for wrongful eviction, breach of the warranty of habitability and intentional infliction of emotional distress. 501 N.Y.S.2d at 110. The Court only awarded damages on the emotional distress claim, but Plaintiff thought all her claims should have been redressed (an issue of liability). However, the Notice of Appeal was limited to that portion of the judgment which is "on the amount of damages." *Id.* Ms. Vias averred that she intended to raise the issue of liability on appeal, but incorrectly limited herself by the language set forth in the Notice of Appeal. Nonetheless, the Notice of Appeal excluded from consideration any question of liability.

In this case, Petitioner-Employee has completely failed to offer any explanation for his failure to assert these constitutional objections to the Trial Court. The Petitioner-Employee's Notice of Appeal took an appeal "to the extent that such Order and Judgment (i) reduced the jury's verdict in favor of plaintiff and against defendants from $205,000.00 to $34,266.67." Petitioner-Employee raised no question as to liability. The Appellate Division affirmed that ruling. Petitioner-Employee cannot resurrect this issue which he waived in his Notice of Appeal.

Accordingly, based on the Notice of Appeal, the Trial Court's findings and Petitioner-Employee's own admissions, it is indisputable that the issue on appeal was one of damages, not credibility or liability. Based on the facts above, Petitioner-Employee cannot contend that he was denied due process of law. Thus, the Appellate Division's ruling was appropriate and consistent with Petitioner-Employee's constitutionally protected rights.

D. The Petitioner-Employee's Right to Equal Protection of the Laws Has Not Been Violated

The Petitioner-Employee has not been denied his rights to equal protection of the laws because he has not been denied of any adjudicatory procedure on the alleged liability issues nor has he alleged that he has sustained any class-based invidious discrimination. When courts address a claim of deprivation of Equal Protection rights, the situations generally fall into two distinct groups. The first group consists of situations where a statute is being challenged on constitutional grounds. The general rule for this first group of cases is that "[w]hen a statute neither impinges on a

fundamental right guaranteed by the Constitution nor uses a classification based on a suspect criterion such as race, nationality, alienage, or gender, the law generally will not be found to violate the Equal Protection Clause unless it has no reasonable or rational basis" *Story v. Green*, 978 F.2d 60, 63-64 (2d Cir. 1992). The present situation does not fall within the group of cases challenging the constitutionality of a statute.

The second group of cases deals with a facially lawful statute which is being applied by the state in a manner which would deprive a person of equal protection. When addressing a claim of selective application of a facially-lawful state regulation, the Second Circuit has stated that there must be a finding that:

> (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person"

FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992).

The present situation has no relation to the two groups of cases that fall within the purview of the Equal Protection Clause. To the contrary, the facts of this case show that Petitioner-Employee received equal protection of the law. The Petitioner-Employee states that the New York State Appellate Division deprived him of his right to equal protection of the laws by depriving

him of any adjudicatory procedure on the alleged liability issues of forgery, building visits, and written notice of malfeasance. [Petition, at p. 19].

As mentioned earlier, Petitioner-Employee was afforded his full rights when the jury heard and saw all the evidence and witnesses presented to them in the Trial Court by both the Petitioner-Employee and the Respondents-Employers. Specifically, Petitioner-Employee presented his claims to the jury and the jury after hearing all the evidence, rendered its verdict. Respondents-Employers made a post-trial motion to reduce the jury verdict and the Trial Court granted said motion. Petitioner-Employee filed an appeal with the Appellate Division seeking only a review of the issue of damages. Petitioner-Employee had an opportunity to be heard before the Appellate Division and the Appellate Division affirmed the Trial Court's decision to reduce the jury verdict. Petitioner-Employee moved before the Appellate Division for leave to appeal to the Court of Appeals. Based on the foregoing facts, the Petitioner-Employee cannot now assert that he did not receive any type of adjudicatory procedure and was denied his equal protection rights. In fact, it is fatal to Petitioner-Employee's equal protection claim that he was not deprived of any adjudicatory procedure on the liability issues. The only issue appealed and affirmed by the courts was the reduction of the jury's damage award.

Even if Petitioner-Employee was denied an opportunity to be heard on liability issues, his assertion that his right to equal protection of the laws has been violated would still fail. This is true because Petitioner-Employee does not fit into a suspect class, nor can he allege that he has been treated differently than anyone else. The equal protection clause in the United States Constitution is essentially a direction that all persons

similarly situated should be treated alike. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985). It prohibits states and local governments from acting, through the passage or application of law, in a way which discriminates against one or more classes or people. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Avery v. Midland County, Texas*, 390 U.S. 474 (1968). A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. *Huebschen v. Department of Health and Soc. Serv.*, 716 F.2d 1167, 1171 (7th Cir.1983) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (footnote omitted) (emphasis added.)) Moreover, "The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). Here, Petitioner-Employee has not asserted that he was intentionally discriminated against by virtue of membership in a particular class or group.

Thus, this failure to allege any class-based invidious discrimination is fatal to the Petitioner-Employee's equal protection claim. In this action, it is unclear what improper class-based discrimination the Appellate Division is alleged to have violated in affirming the Trial Court's decision. Additionally, Petitioner-Employee has failed to allege that he has been intentionally discriminated against or unfairly treated. Since the factual situation in this case does not come within the realm of the matters that are protected

by the Equal Protection Clause of the Fourteenth Amendment, as a matter of law, Petitioner-Employee failed to sustain its burden of showing that he has a recognizable claim arising under the Equal Protection Clause.

IV. THE ISSUES PRESENTED BY PETITIONER-EMPLOYEE DO NOT MERIT THIS COURT'S REVIEW

The issues raised in Petitioner-Employee's Petition do not merit this Court's review. The Petitioner-Employee approached this Court seeking correction of the Appellate Division's alleged error of its decision. This Court has long held, it "do[es] not grant certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 US. 259, 275 (1981) (Stevens, J., concurring) See also, *Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of the Court's discretionary docket."). Petitioner-Employee gives absolutely no "compelling reasons," other than personal unhappiness with the outcome of the Appellate Division Decision that would warrant this Court's extraordinary review. Instead, Petitioner-Employee states without any authority that this Court should grant certiorari because it presents an extremely important opportunity for this Court to vindicate the right to jury trial so that rendered jury verdicts are not unlawfully set aside by appellate courts, in violation of due process, equal protection of the laws and the last clause of the Seventh Amendment. However, in this case, the Trial Court correctly reduced

the jury verdict for damages and the Appellate Division correctly affirmed the Trial Court's reduction of damages. These actions taken by the Trial Court and the Appellate Division are unquestionably constitutional and are well-settled principles of law. Thus, this Petition falls far short of either the inter-circuit conflict, See Point V, *infra.*, or important federal questions standards, which are required for this Court's review. Supreme Court Rule 10. Hence, based on the foregoing, this case is a singularly inappropriate vehicle for consideration of the questions presented by the Petition and the Appellate Division Decision should stand.

V. THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH ANY OTHER DECISION

The Appellate Division's affirmance of the Trial Court's decision ordering a reduction in the amount of damages, a ruling that has been vibrant for almost 300 years, was constitutional in all respects. This rule continues to be applied today. The Appellate Division Decision does not conflict with the decisions of any other state's highest court, with the decision of any federal court of appeals, or with any decision of this Court. Moreover, Petitioner-Employee does not even allege that the Appellate Division Decision conflicts below with any other decision. Thus, Petitioner-Employee is trying to urge this Court to abandon the common law accepted by this nation, and indeed by the entire Anglo-Saxon justice system, with respect to a court's inherent right to reduce a jury's award of damages. Based on the foregoing, under law that has been consistently applied by state and federal courts for almost 300 years, this Court should deny Petitioner-Employee's Petition for a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, Respondents Lawrence-Properties, Inc., Lawrence-Picaso, Inc., d/b/a Lawrence Properties and Lawrence Properties respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Index No. 603935/99

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARK WIENER,
Plaintiff,

-against-

LAWRENCE-PICASO, INC., LAWRENCE PICASO, INC., d/b/a LAWRENCE PROPERTIES and LAWRENCE PROPERTIES,
Defendants

(Assigned to IAS, Part 44, Justice Norman C. Ryp)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the plaintiff MARK WIENER hereby appeals to the Appellate Division, First Department, of the Supreme Court of the State of New York, from an Order and Judgment issued by Justice Norman C. Ryp, entered in the above—entitled action in the office of the Clerk of the County of New York on February 5, 2002, to the extent that such Order and Judgment: (1) reduced the jury's verdict in favor of plaintiff and against defendants, from $205,000.00 to $34,266.67; (ii) failed to enter judgment in the amount of such $205,000 verdict; and (iii) failed to award interest from July 29, 1999 to the date of entry of judgment on the amount by which such $205,000.00 sum exceeded $34,266.67, and only from such parts of the aforesaid Order and Judgment and from no other part.

Dated: New York, New York February 5, 2002

Yours, etc.,

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